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IN THE

Supreme Court of the United States

October Term, 1975

NO. 75-6321

ROBERT GORDON POSTELWAITE and
GARY LEE FRAZIER,

Petitioners,

v.

LEE BECHTOLD, SHERIFF of WOOD COUNTY, WEST VIRGINIA, JON D. JACKSON AND IRA M. COINER, WARDEN OF THE WEST VIRGINIA PENITENTIARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioners respectfully pray that a writ of certiorari issue to review the judgement of the Supreme Court of Appeals of West Virginia entered in this proceeding on February 4, 1975.

OPINION BELOW

The opinion below was rendered, upon an appeal, by the Supreme Court of Appeals of West Virginia and the case is unofficially reported in 212 S. E. 2d 69. The opinion is set forth in full in the Appendix herein.

JURISDICTION

The judgement of The Supreme Court of Appeals of West Virginia was entered on February 4, 1975 and the Appellate Term of court below ended on July 29, 1975. The jurisdiction of This Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The sole question to be considered herein is whether the petitioners were denied the protection of The Sixth Amendment right to effective assistance of counsel where uncontradicted evidence at a post-conviction proceeding indicated the existence of a conflict of interest by virtue of a divergence of interests by reason of dual representation by the same attorney at the trial level.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

CONSTITUTION OF WEST VIRGINIA

Article 3, Section 14

> "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation,

and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defence; and there shall be awarded to him compulsory process for obtaining witnesses in his favor."

STATEMENT OF THE CASE

References made herein will be to the certified record filed in this Court containing the transcript of evidence of the criminal trial in the Circuit Court of Wood County West Virginia (R.), and to the transcript of evidence adduced at the post-conviction habeas corpus heairng held in the Circuit Court of Wood County on December 16, 1972, (H.C.). The parties will be referred to as the "petitioner(s)" and the "respondents" or "State".

Petitioners were jointly indicted in July, 1971, for receiving a 1968 Mustang automobile, jointly tried and jointly represented by Eugene T. Hague, Sr., and Eugene T. Hague, Jr., and found guilty by a jury verdict rendered on April 27, 1972. On July 10, 1972, petitioners were sentenced to confinement for a term of not less than one nor more than ten years, and were granted a stay of execution.

On September 6, 1972, petitioner Postelwaite filed a petition for writ of habeas corpus in the West Virginia Supreme Court of Appeals alleging that he had been denied the right to effective assistance of counsel guaranteed by Article III, Section 14 of the West Virginia Constitution and by the Sixth Amendment to the United States Constitution due to the conflict of interest created by the joint representation (H.C. 7) Attached to the petition was the joint affidavit of the Hagues asserting, *inter alia*, that because of the joint representation they did not attempt to pursue any type of plea bargaining, made no motion for sever-

ance, were limited in their cross-examination of the State's witnesses and in summation to the jury and that because of the joint trial the evidence became cummulative against each of the petitioners. Accordingly, by order entered on September 11, the Court below awarded the writ and made it returnable on September 26, 1972. (H.C. 50-52).

On September 21, 1972 counsel for respondents filed motions to dismiss respondents Donald F. Black and R. Bruce White, to amend the order of September 11 so as to make the writ returnable before the Circuit Court of Wood County or in the alternative to continue the matter for at least six weeks. One of the grounds set forth in the motion was that the" . facts surrounding the alleged conflict should be thoroughly developed by testimony of trial counsel, petitioner (defendant), the trial prosecutor and/or others, whose testimony could and should be presented at an evidentiary hearing."

Accordingly, this matter came on for hearing on December 6, 1972 in the Circuit Court of Wood County, West Virginia and the evidence adduced at that hearing, coupled with the trial transcript filed by the respondents, produces the following summary.

Sometime in April, 1972, as a result of a criminal investigation involving an alleged auto larceny, petitioner Postelwaite and Gary Lee Frazier, an employee of Postelwaite at Capri Motors, retained Eugene T. Hague, Sr.; thereafter Postelwaite and Frazier were jointly indicted at the July, 1971, Term of court.

Two other men, Jack Dale Bennett and Randy Hall, were also allegedly involved in the criminal investigation and were indicted on other felonies; each was represented by separate counsel and granted immunity to testify at the

trial (R. 4; R. 158, 198). However, because of the joint representation of petitioners by the same attorneys, no attempt or effort was made by defense counsel to pursue any type of plea bargaining or attempt at immunity for petitioners (R. 5; H.C. 3, 8). Counsel were aware that the State had worked out an agreement with other persons involved in the investigation but did not attempt to plea bargain for petitioners because ". . it would be impossible to bargain for one against the interest of the other" (H.C. 3), and because they". . were defending both defendants, and I did not feel I could be called upon to prejudice the position of one of our clients as against the other by a plea bargaining deal . . " (HC.10).

Trial on the indictment was continued by the State until April 25, 1972, when petitioners were jointly tried and found guilty by a jury verdict rendered on April 27. (R. 35). Because of the joint representation counsel did not attempt to sever the trial for petitioners although counsel would have made such a motion if they had represented either one of the petitioners separately (H.C. 3, 8).

During the trial defense counsel were seriously limited in their cross-examination of the State's witnesses because these witnesses ". . . brought evidence forth concerning involvements with one defendant on one case, another defendant on another, and sometimes involvement with both defendants, and we were limited in that we could not delve into the involvement of one of the defendants for the benefit of the remaining defendant." (HC. 4).

More specifically, Randy Hall, one of the immunized witnesses who had stolen the automobile in question, could not recall whether he had talked to Postelwaite or Frazier about the automobile and, over objection, was permitted to

testify about other alleged "dealngs" with petitioners (R. 167, 168). Some of these "dealings" were allegedly with Frazier (R. 169), some with Postelwaite (R. 170, 171), and some with both Frazier and Postelwaite (R. 171-173, 176). However, on cross-examination Hall admitted that he did not try to sell or deliver the Mustang to Postelwaite but that he and George DeBerry stole it because they wanted the engine (R. 192, 193). Mr. Hague, Sr., conducted the cross-examination but could not develop these matters because ". . . In one statement he would try to involve Mr. Postelwaite and in another try to involve Mr. Frazier, and in the third, try to involve both, and his statements were such that they were, to me at least, for evidentiary purposes not responsive to proper cross examination without causing some injury to either one or both of my clients, so far as presenting the case to the jury was concerned . . ." (H.C. 9).

Jack Dale Bennett, the other immunized witness, denies that he was present at Capri Motors when the witness Hall testified that the conversation with Postelwaite about the Mustang allegedly occurred and that when he, Bennett, saw the Mustang ". . . Gary Frazier was under the hood of it" (R. 201). Bennett further stated that Gary Frazier had "stripped" the Mustang and put the engine in the back of a truck (R. 202, 203) and was permitted to testify about other "dealings", all of which were solely with Frazier (R. 208-211). However, none of this was developed in the extremely limited cross-examination of Bennett by Mr. Hague, Jr., (R. 212, 213), because ". . . we were limited in that we could not delve into the involvement of one of the defendants for the benefit of the remaining defendant." (H.C. 4).

Moreover, at the close of the State's evidence in chief, counsel, in arguing the motion for directed verdict, was unable to point out the specifics of the State's inability to

prove delivery of the Mustang in question to Postelwaite from Bennett's testimony (R. *227, 228*) in spite of the State's admission in an affidavit for a continuance that Bennett was a ". . . material and necessary witness for the state in this case in that he is the only person who can testify to the defendant (Postelwaite) having taken in his possession the alleged stollen (sic) vehicle . . ." (H.C. 17; Exhibit No. 1).

The final summation by Mr. Hague, Sr., was also affected by the joint representation and was ". . . the same situation as far as cross examination was concerned. I thought we could not single out any particular phase of the testimony of either one of these gentlemen (the immunized witnesses) without causing - - I use the term injury - - I mean unfavorable reaction of the jury to the testimony . . ." (HC. 9, 10). Throughout the trial, the joint representation admittedly limited defense counsel to ". . . a middle-of-the road approach rather than shifting of the responsibility from one to the other . . ." (HC. 10).

Petitioners were never advised by counsel nor was inquiry ever made by the trial court concerning the "conflict" situation, and petitioners left their defense to their counsel (H.C. *27*, 31).

The evidence presented in the verified petition for habeas corpus and the affidavit of the Hagues attached thereto upon which the West Virginia Supreme Court of Appeals initially granted the writ was never controverted by the respondents and in spite of the representations made to the Court below *via* the motions to remand, etc., no contradictory or impeaching evidence was presented at the hearing on December 6, 1972. In fact, the respondents produced only one independent witness at the hearing, assistant prosecutor

James W. Simonton, whose testimony was, in effect, that he had never approached defense counsel with respect to plea bargaining. However, he admitted that the Hagues had made no efforts to plea bargain with him, as was the usual practice, and he could not speculate as to why no attempts had been made. Accordingly, the evidence of petitioners was uncontradicted in the record before the Circuit Court of Wood County (H.C. 148-184).

By memorandum opinion dated April 27, 1973, the Circuit Court granted writs of habeas corpus in these consolidated cases, pertinent parts of which opinion are as follows:

> "The law appears abundantly clear, since Glasseer v. United States, 315 U. S. 60 (1942), recognized in State ex rel. Favors v. Tucker, 143 W. Va. 130 (1957), that there is a denial of effective assistance of Counsel, prohibited by the Sixth Amendment, where a single lawyer represents two or more defendants with conflicting interests. Under the Glasser rationale, the 'precise degree of prejudice' resulting to defendants so jointly represented is not determinative. Since both Petitioners herein were in fact represented by the same Counsel, the sole question presented for decision is whether the Petitioners did, in fact, have conflicting interests during their joint trial.
>
> "According to the testimony and affidavits of trial counsel, a principal witness for the estate, testifying under a grant of immunity, testified as to transactions with each Petitioner as well as joint transactions involving both Petitioners. It further appears from trial counsel's testimony that at least at this point in the trial, it became in the best interest of each Petitioner to emphasize the culpable conduct of the other, a task which, of coursee, was rendered impossible by joint representation. As counsel testi-

fied he was compelled by joint representation to adopt a 'middle of the road' policy rather than to exploit the positive aspects of the witnesses testimony favoring one client to the detriment of the other.

"It is, in short, clear from counsel's testimony that the defense of each petitioner was tempered by factors related to the best interests of his co-defendant. This is precisely the hampering effect condemned in cases subsequent to Glasser. See, in particular, Sawyer v. Brough, 358 F. 2d 70 (4th Cir. 1966).

"No evidence was offered by the state to contradict testimony of counsel, other than the fact that both Petitioners relied upon pleas of innocence, and that the testimony of the witness above referred to was limited by the Court to the guilt of Petitioner Postelwaite only. Neither factor, however, serves to mitigate the hampering effect apparent from trial counsel's testimony.

"Accordingly, it does appear from the evidence that the Petitioners did in fact have conflicting interests during their joint trial. While the extent of prejudice resulting therefrom may have been minimal, I cannot find that there was no possibility of prejudice." (H.C. 128-131).

Thereafter, on February 27, 1974, a petition for writ of error was filed below assigning as error the granting of the writs "... in that there was no conflict of interest arising from the joint representation by the Hagues of Postelwaite and Frazier." (H.C. 141 D). The appeal was granted on April 8, 1974, and, thereafter, upon submission of briefs and arguments below the West Virginia Supreme Court of Appeals reversed the Circuit Court's decision and held that joint representation by counsel of two or more accused defendants is not improper *per se* (Appendix)

REASON FOR GRANTING THE WRIT

In a Post-Conviction proceeding involving uncontradicted evidence of a conflict of interest by virtue of a divergence of interests, it is not necessary that the precise manner in which the defendant has been harmed by the conflict be delineated; the possibility of harm is sufficient to render the conviction invalid and thus violates the Sixth Amendment to the United States Constitution.

The right to counsel, which is here involved, is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, *Gideon* v. *Wainwright*, 372 U. S. 355, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and the right is not satisfied by mere *pro forma* representation but demands "effective aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *McMann* v. *Richardson*, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).[1] It requires more than the mere entry of an appearance by an attorney in his behalf and ". . . requires nothing less than the undivided loyalty of counsel in behalf of his client . . ." *State* v. *Ebinger*, 97 N. J. Super. 23, 234 A. 2d 233, 235 (1967), as well as the readiness to protect his client by contesting all actions adverse to his interests. *Soulia* v. *O'Brien*, 94 F.

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[1]Moreover, this concept is firmly restablished under Article III, Section 14, of the West Virginia Constitution, and requires "effective" assistance of counsel and assistance without any "conflict of interest between defendants whom counsel represent . . ." *State ex rel. Favors* v. *Tucker*, 143 W. Va. 130, 140, 100 S. E. 2d 411 (1957), cert. denied, 357 U. S. 908 (1958), citing *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 60, 86 L. Ed. 680 (1942). Cf. *State* v. *Britton*, ____ W. Va. ____, 203 S. E. 2d 462, 466 (1974).

Supp. 764 (D. Mass. 1950), aff'd. 188 F. 2d 233 (1st Cir.), cert. denied, 341 U. S. 928 (1951).

Since *Glasser*, the leading case in this area, it is clear that a conflict of interest in the representation of two or more defendants is a denial of effective assistance of counsel. In that case, five defendants - including Glasser - had been tried jointly for conspiracy to defraud the Government. At trial one of the defendants, Kretske, became dissatisfied with his appointed counsel and Glasser's retained attorney was appointed to also represent Kretske. Upholding Glasser's claim that the appointment inhibited his attorney's conduct so as to deny effective assistance, this Court noted that the Sixth Amendment contemplates that assistance of counsel should ". . . bee untrammeled and unimpaired . . ." and although Glasser, an attorney, had remained silent throughout the appointment and trial, the Court refused to find that he had effectively waived his right to separate counsel. (315 U. S. at 70, 71).

In addition to finding that the attorney's "struggle to serve two masters" did in fact impair his effectiveness, this Court noted that:

> "Irrespective of any conflict of interests, the additional burden of representing another party may conceivably impair counsel's effectiveness . . .
>
> "To determine the precise degree of prejudice sustained by Glasser as a result of the Court's appointment . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (513 U. S. at 75-76).

Accordingly, the main thrust of the Court's reasoning for setting aside Glasser's conviction was that the joint

representation had infringed upon his Sixth Amendment right to effective assistance of counsel because his representation ". . . was not as effective as it might have been if the appointment had not been made." (315 U. S. at 75-76).[2]

In *Sawyer* v. *Brough*, 358 F. 2d 70 (4th Cir. 1966), an appeal of a habeas corpus case, counsel testified that he had not felt that any conflict of interest existed between two defendants and implied that he had given his full efforts and loyalty to each. However, that Court, in a well reasoned opinion by Judge Boreman, at page 73 of the opinion, stated:

> "We realize that this conflict of interest between Sawyer and Espin may not have made its presence felt in their trial and conviction . . ."
>
> "Despite these appearances, we cannot be persuaded that the jealously guarded constitutional right to effective assistance of counsel has been accorded to Sawyer. Most assuredly we do not mean to impugn the integrity of court-assigned counsel, but there was no finding by the District Court that counsel was not handicapped in his representation of the two defendants by the conflict of interest. The District Court found that no conflict existed and did not go beyond that finding. Under these circumstances, we cannot, on the mere strength of the attorney's testimony, dismiss as without merit Sawyer's claim that the right of effective representation had been denied him."
>
> "The salient fact remains that divergent interests did exist; and therefore an opportunity was pre-

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[2]See also, *Kelly* v. *Peyton*, 420 F. 2d 912, 914 (4th Cir. 1969), for the proposition that it is immaterial whether counsel is appointed or retained in the disposition of this question.

> sented for the impairment of Sawyer's right to the unfettered assistance of counsel. *It is not necessary that Sawyer delineate the precise manner in which he has been harmed by the conflict of interest; the possibility of harm is sufficient to render his conviction invalid . . .*" (Citing *Glasser* v. *United States*). (Emphasis supplied).

In *United States* v. *Truglio*, 493 F. 2d 574 (4th Cir. 1974), Truglio and four others were indicted for possession of stolen postal money orders and conspiracy. Due to the untimely death of one of counsel prior to trial, *one lawyer* undertook the representation of all five of the defendants. On the third day of a joint jury trial counsel for the defendants and the United States Attorney entered into plea bargaining discussions and pleas were entered by all the defendants. The following day Truglio consulted another attorney who thereafter submitted a motion for withdrawal of Truglio's plea as involuntary on the ground, *inter alia*, that the coercive conduct of defense counsel during the negotiations denied Truglio the effective assistance of counsel. A hearing was conducted on the motion and the district court concluded that the plea had been voluntary.

On appeal, Judge Field, speaking for the court, had no difficulty in resolving the majority of questions presented but noted that ". . . Truglio's charges with respect to the conduct of his counsel and the coercive atmosphere attendant upon his plea presents a more serious question." (493 F. 2d at 579). Noting that the district court should have conducted a more searching inquiry before accepting the plea, Judge Field continued:

> "Here the court knew that the plea bargain had been negotiated by one attorney who represented all five of the defendants, and while representation of codefendants by the same attorney is not in itself

tantamount to the denial of effective assistance of counsel, '[t]he very fact that two or more co-defendants are represented by the same counsel should alert a trial judge and cause him to inquire whether the defenses to be presented in any way conflict.' *United States* v. *Lovano*, 420 F. 2d 769, 772 (2 Cir. 1970)."

As is in the instant case, the Court, in *Truglio*, noted that the evidence was unrefuted and in reversing the conviction, at page 580, concluded:

"Upon the record before us, we find that Truglio's interests were so commingled with those of his four codefendants that it was impossible for Pietranton to devote his full efforts on behalf of Truglio. Documented as it is, this was a denial of effective assistance of counsel which clearly outweighs the prejudice which the Government will suffer, and it was an abuse of discretion by the trial court to deny Truglio's motion." (Emphasis supplied).

In *Zurita* v. *United States*, 410 F. 2d 447 (7th Cir. 1969), the petitioner contended that because his privately retained counsel had certain business connections with the alleged robbed bank, he could not have provided effective assistance of counsel. The district court denied an evidentiary hearing on the petition stating that even if petitioner established the facts alleged it would not amount to such a conflict of interest as to invalidate his conviction, also citing trial counsel's apparently zealous defense. The Circuit Court of Appeals, in vacating and remanding the case to the district court for a hearing, quoted from an Illinois case, *People* v. *Stovall*, 40 Ill. 2d 109, 239 N. E. 2d 441 (1968), as follows:

". . . The circumstances here are such that an attorney cannot properly serve two masters.*** [defendant's] right to counsel under the Constitu-

tion is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all. See *Gideon* v. *Wainright* [Wainwright], 372 U. S. 335 (1963), 83 S. Ct. 792, 9 L. Ed. 2d 799. *This situation is too fraught with the dangers of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of relator's rights whether or not it in fact influences the attorney or the outcome of the case.*"

"There is no showing that the attorney did not conduct the defense of the accused with diligence and resoluteness, but we believe that sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests. It is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally by the conflict. Too, it places an additional burden on counsel, however, conscientious, and exposes him unnecessarily to later charges that his representation was not completely faithful. *In a case involving such a conflict there is no necessity for the defendant to show actual prejudice. Glasser* v. *United States,* 315 U. S. 60, 62 S. Ct. 456, 86 L. Ed. 680; *Goodson* v. *Peyton,* (4th Cir.), 351 F. 2d 905, 40 Ill. 2d at 112, 113, 239 N. E. 2d at 443." (Emphasis supplied).

Several enlightened state court decisions reflect the federal approach to the conflict of interest problem and perhaps the leading state "conflict" case is *Commonwealth ex rel. Whitling* v. *Russell,* 406 Pa. 45, 176 A. 2d 641 (1962), an oft-cited habeas corpus case. There appellant and his brother were indicted, tried and convicted on a charge of sodomy. Prior to trial appellant retained counsel who was thereafter also appointed to represent appellant's brother.

Appellant's position was that he was innocent but that his brother was guilty. At the trial appellant testified against his brother even though his brother testified in appellant's behalf. In reversing the lower courts' finding of no conflict, the Supreme Court of Pennsylvania, held:

> "If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no *actual* harm results. The potentiality that such harm *may* result, rather than that such harm *did* result, furnishes the appropriate criterion . . . The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." (Court's emphasis).

At page 643 of the opinion the Court observed that:

> ". . . *We cannot say that counsel in the instant case was not effective.* But could he not have been more effective, and more able to utilize the evidence if he had not been burdened by the chore of defnding two defndants whose positions were inconsistent and *a variance? Of necessity counsel in the instant case had to temper his strategy and tactics to a middle-of-the-road position* . . ." (Emphasis Supplied).

See, *People* v. *Richardson*, ... Ill. App. ....., 287 N.E. 2d 517 (1972), an appeal from a post-conviction hearing denying relief where an attorney's conflict of interest was charged in the petition for habeas corpus. The Court, in reversing and remanding, at page 519 of the opinion, stated:

> "In the case at bar, there is no prejudice shown; there is no finding of intentional fraud or misrepresentation.
>
> * * *
>
> "*No showing of actual prejudice is required where the services of the attorney are rendered in a*

> *duplicitous position, where the full talents are inhibited as a vigorous advocate and are hobbled or fettered by his commitment to others. The conflict of interest precludes a constitutionally fair representation . . .*" (Emphasis supplied).

Also, in *State* v. *Belcher*, 106 Ariz. 170, 472 P. 2d 39 (1970), where counsel was unable to call to the stand a witness desired by defendant because to do so would conflict with counsel's representation of that witness and the State contended that there was no actual conflict because there was no harm to defendant and that defendant's counsel may have determined that the witness' testimony would not aid defendant's case. The Court rejected this contention stating, at page 40, that:

> ". . . We believe that the State's argument is simply speculation upon the degree of prejudice inflicted because of counsel's conflict of interest. . ."

The Court concluded that it was now well established that if a conflict of interest exists, courts would not speculate upon the amount of prejudice that would arise but that "reversible error would be presumed." (472 P. 2d at 41).[3]

From the foregoing authorities it is clear that whenever one lawyer understakes to represent two or more defendants there is a distinct possibility that a conflict may arise. This conflict need not appear as an obvious inconsistency of defenses between them but can arise in various forms which

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[3]Similar results are reached in the following state cases: *State* v. *Masters*, 108 Ariz. 189, 494 P. 2d 1319 (1972); *Baker* v. *State*, 202 So. 2d 563(566 (1967); *State* v. *Ebinger*, 234 A. 2d 233 (N. J. 1967); *Commonwealth* v. *Dawud*, 218 Pa. 802, 275 A. 2d 686 (1971); *People* v. *Thompson*, 13 Cal. App. 3d 47, 91 Cal. Rptr. 341 (1970).

are not readily ascertainable except in post-trial proceedings. Determining the precise degree of harm is difficult and unnecessary, for as noted in *Glasser*, the right to effective assistance of counsel is ". . . too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." [4]Accordingly, petitioners herein are not required to show the precise amount of harm or to delineate the precise manner in which harm was effectuated, for the possibility of harm is sufficient—a showing that the representation was not as effective as it might have been. Nor is it necessary to show that there was an actual conflict between the positions of the co-defendants to establish a Sixth Amendment claim, for the courts look not only for actual conflict but also for areas of potential conflict. This conflict can manifest itself in the decision of which, if either, defendant will testify, the professional consideration and advice given to one defendant concerning his individual problems, in choosing between conflicting duties or interests, in tempering tactics and strategy to a middle-of-the-road approach or in the context of preferential treatment, etc.

Because of the candor and professional honesty of trial counsel in the instant case it is unnecessary to search the record for areas of "actual" or "potential" conflict. Trial counsel herein readily acknowledge that because of the joint representation they did not attempt to pursue any type of plea bargaining or other negotiations with the State (H.C. 3, 10). Whether or not these negotiations would have

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[4]Indeed, the court below erroneously failed to consider direct uncontroverted evidence of the "hampering" effect of dual representation and improperly reduced the trial court's finding of conflict to the level of "conjecture and surmise." (Appendix, P. 12).

or could have been productive is immaterial; the point is that they were precluded from even exploring the possibility. Cf. *Baker* v. *Wainwright*, 442 F. 2d 145 (5th Cir. 1970).

Trial counsel herein also candidly admitted that because of the joint representation no motion for severance was made but that they would have made such a motion if they had represented either one of the petitioners separately (H.C. 3, 8). As a result, much evidence was admitted against Postelwaite as to dealings had with Frazier that would not have been admissible as against Postelwaite in a separate trial. (e.g. HC. 4, 9; R. 169, 208-211, 227, 228).

Trial counsel stated unequivocally that their cross-examination of the State's witnesses was seriously limited because these witnesses ". . . brought evidence forth concerning involvements with one defendant on one case, another defendant on another, and sometimes involvement with both defendants, and we were limited in that we could not delve into the involvement of one of the defendants for the benefit of the remaining defendant." (H.C. 4); that proper cross-examination was impossible because the evidence of the State's witnesses was such that it would have caused ". . . injury to either one or both of my clients . . ." (H.C. 9).

The final summation to the jury by Mr. Hague, Sr., was also inhibited by the joint representation. It was ". . . the same situation as far as cross examination was concerned. I thought we could not single out any particular phase of the testimony of either one of these gentlemen (Hall or Bennett) without causing some — I use the term injury — I mean unfavorable reaction of the jury to the testimony . . ." (H.C. 9, 10). This is also borne out in the record which demonstrates that Mr. Hague, Sr., scrupulously avoided pointing out any specific defects in the State's case as

against either of petitioners for fear of the resulting damage to the other (R. 299-308). In this respect, see *People* v. *Chacon*, 73 Cal. Rptr. 10, 447 P. 2d 106, 113 (1968), where the Court predicated the conflict, *inter alia*, upon final summation, noting that counsel ". . . could not make these arguments in favor of each defendant to dissociate him from his co-defendants' cases, for he represented them all and had to make common cause for them . . ."

As a result of the joint representation the conduct of the entire trial was geared, of necessity, to ". . . a middle-of-the-road approach rather than shifting of the responsibility from one to the other . . ." (H.C. 10). This, of course, is not the type of ". . . untrammeled and un-impaired . . ." assistance contemplated by the Sixth Amendment, *Glasser* v. *United States*, *supra*, and it is the purpose of the rule prohibiting an attorney from representing conflicting interests so as to be forced ". . . to temper his strategy and tactics to a middle-of-the road position . . ." rather than ". . . to enforce, to their full extent, the rights of the party whom he should alone represent . . ." *Commonwealth ex rel. Whitling* v. *Russell*, 406 Pa. 45, 176 A. 2d 641, 643 (1962).

This was the salient point announced in *Lollar* v. *United States*, 376 F. 2d 243 (D. C. Cir. 1967). There appellant and co-defendant were convicted of robbery and appellant contended that requiring him to share an attorney with his co-defendant deprived him of his Sixth Amendment rights. Although the court did not specify the nature of the conflict, in relying on *Glasser* and reversing the conviction, the following pertinent observation was made:

> "The obvious reason against insisting on a precise delineation of the prejudice suffered is that such a task is made very difficult when one must rely on a

> cold, printed record for reconstruction of the manifold and complex dynamics of the trial process, including reasons for trial tactics which may have been dictated by the joint representation. *Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest co-defendant's conflicting interests may well be the tell tale signs of deeper conflict. Because of this, and because of the fundamental nature of the right involved, when there are indications in the record that stir doubts about the effectiveness of joint representation, those doubts should be resolved in favor of the defendant. . .*"
>
> "We hold, therefore, that only where 'we can find no basis in the record for an informed speculation 'that appellants' rights were prejudicially affected' can the conviction stand . . . In effect, we adopt the standard of 'reasonable doubt,' a standard the Supreme Court recently said must govern whenever the prosecution contends the denial of a constitutional right is merely harmless error . . . *When measured against this standard, the record in the present case fails to convince beyond a reasonable doubt that appellant was not prejudiced because of the joint representation.*" (Emphasis supplied).

The Court, in referring to *Glasser*, noted that the trial judge bears "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" and, at page 361, held that:

> ". . . a trial judge has a responsibility to assure that co-defendants' decision to proceed with one attorney is an informed decision . . ."

In *McIver* v. *United States*, D. C. App., 280 A. 2d 527 (1971), appellants had been represented by the same at-

torney, who prior to trial, had represented to the trial court that he could ". . . see no conflict of interest whatsoever." Trial counsel also inquired of each of the appellants whether there was any objection to his representation of both of them and each responded in the negative. There was no further inquiry or comment by the trial court. As in the instant case, part of the government's proof therein was uncertain as to which of the appellants was in actual or construction possession of the premises where the prohibited articles were found.

However, in putting on the defense, trial counsel was unable to develop the deficiency as against one of the appellants because it would ". . . perhaps have had the effect of shifting to appellant Pete McIver the entire responsibility representing domination and control at the apartment with all the constructive possession implications . . ." Thus, the Court, at page 531 (290 A. 2d) noted:

> "Enough has been said to demonstrate that each appellant was prejudiced by the joint representation. We need not, of course, gauge the precise degree of prejudice. The right to have effective 'assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial' ". (citing *Glasser*).

Cf. *Commonwealth* v. *Booker*, 219 Pa. Super. 91, 280 A. 2d 561 (1971).

Ostensibly, the position of the court below appears to be either that there was no conflict involved or if there was, it was overcome because it was part of the "trial strategy" utilized by trial counsel (Appendix, pp. 9-12). This, of course, ignores the uncontroverted evidence of trial counsel

that their "strategy" was dictated by the joint representation and demonstrates vividly the evil sought to be corrected. As noted earlier herein, a "conflict" case is essentially a problem of effective assistance of counsel and where, as here, constitutional errors are involved, the test to be applied in determining prejudice is that applied by the United States Supreme Court. Cf. *United States* v. *DeBerry*, 487 F. 2d 448, 452 (2d Cir. 1973).

In *Craig* v. *United States*, 217 F. 2d 355 (6th Cir. 1954), defendant and one Butzman were convicted of fraudulent execution of a document required by the IRS after a joint trial wherein they were represented by the same attorney. Neither Craig nor counsel were of the opinion that a genuine conflict of interest would develop at the trial and there was no antagonism in the positions of the defendants on the vital issue of their alleged knowledge and their positions were consistent ". . . on this all-important issue." As here, two witnesses testified of discussions about the document in question but no effort was made by cross-examination of these witnesses to determine whether the discussions were with Butzman alone or with Craig. Accordingly, on appeal, Craig raised the "conflict" question and the case was remanded to the District Court for a hearing.

The District Court found that the conflict between the defendants prevented any such cross-examination being undertaken because any effort to demonstrate Craig's absence from the discussions would have been damaging to Butzman and, at page 358, continued:

> ". . . At this point in the trial, the strain upon counsel's conflicting loyalties was particularly heavy . . . whether such cross-examination would have developed facts favorable to Craig is a matter of con-

> jecture. That such a cross examination would have been made by counsel who had no interest in Butzman can be confidently assumed . . . Any weakening of Figley's testimony resulting favorably to Craig might have been a material bearing on the outcome of the case. As a result of the conflict of interest counsel's representation was not as effective as it might have been . . . In representing both defendants counsel undertook to perform a difficult, if not impossible, task. Whether the result would have been different if they had been in a position to devote their talents unreservedly in the interest of Craig can not now be determined.' "

Notwithstanding, the District Court held that Craig had waived the right to counsel of his own choosing and that although a conflict developed during the trial it did not invalidate the judgment against Craig. The Circuit Court, in reversing and remanding, stated at page 359 of the opinion:

> ". . . In *Glasser* v. *United States*, supra, the Court expressly pointed out that because of the conflict of interest on the part of counsel, his representation of the accused in that case was not as effective as it might have been if another lawyer had been appointed, and that it was not for the Court to indulge in nice calculations as to the amount of prejudice resulting therefrom. We think it follows from the foregoing findings that although Craig was in no way 'deprived' of his right to independent counsel of his own choosing by any act of the District Judge or District Attorney, nevertheless, by reason of a combination of circumstances, not reasonably foreseeable by Court or counsel, he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment, and that under the particular circumstances of this case he did not intelligently and voluntarily waive such right."

It is to be noted that in *Glasser* counsel had failed to cross-examine fully the prosecution's witnesses and had refused to object to the admission of incriminating statements made by a witness that also implicated Glasser and this was the salient factor behind the Court's finding that counsel's "struggle to serve two masters" did, in fact, impair his effectiveness. (315 U. S. at 75). See also, *Campbell* v. *United States*, 352 F. 2d 359 (D. C. Cir. 1965), where the Court noted that counsel's service was much less effective in that he made no effort to dissociate one defendant from the other and that his cross-examination was lacking.

From the foregoing authorities it is clear that an actual "conflict" in the positions of co-defendants is not a prerequisite to an "ineffective assistance" claim in that there may be a "conflict" in the loyalties of counsel which would preclude and render impossible an attorney effectively representing both clients. It is well settled that the concept of conflict of interest encompasses far more than inconsistent defenses, *People* v. *Gallardo*, 269 Cal. App. 2d 86, 74 Cal. Rptr. 572 (1969),[5] and a claim of "trial strategy" becomes somewhat ludicrous where, as here, any strategy at all was, of necessity, dictated and mandated by the joint representation. *Lollar* v. *United States*, 376 F. 2d 243 (D. C. Cir.

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[5]In *Sanchez* v. *Nelson*, 446 F. 2d 849, 850, (9th Cir. 1971), the district court rejected a "conflict" claim on the basis of consistent defenses and the Circuit Court reversed, stating that the appropriate inquiries were: "Did the representation deprive either or both of the defendants of the undivided loyalty of counsel? Did counsel have to, or did he in fact, 'slight the defense of one defendant for that of another?' " Cf. *People* v. *Thompson*, 13 Cal. App. 3d 47, 91 Cal. Rptr. 341 (1970).

1967).[6] As stated in *State* v. *Davis*, 110 Ariz. 29, 514 P. 2d 1025, 1027, (1973):

> ". . . The reason is obvious: when counsel has to weigh his preferred strategy or tactics or is deterred from bringing out facts favorable to the defendant because of the detrimental effect they may have on a codefendant, the defendant does not receive the competent and complete representation which an attorney is under a duty to render and which the defendant is entitled to receive"[7]

Finally, it must be noted that the appellate court below failed to meet the crucial question raised herein and, rather, chose to "skirt the issue" of Sixth Amendment protection by simply casting the inherent conflict involved with dual representation in the role of "defense strategy." (Appendix, p. 9). The opinion below inconsistently cites directly from trial counsel's statements concerning the limitations placed upon him as a result of dual representation on the one hand (Appendix, p. 5); while on the other hand, the court below refers to conclusions and inferences to be drawn from such

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[6]See also, *State* v. *Martineau*, 257 Minn. 334, 101 N. W. 2d 410 (1960), where the Court found prejudice by the failure of counsel to demand separate trials for jointly represented defendants.

[7]There the Court found the fact that counsel had to exercise some restraint in the conduct of the trial because of the dual representation sufficient to void the conviction. Further, an attorney representing two defendants was in the best position to determine when a conflict existed. Cf. 23 Arkansas Law Review 250, *Conflict of Interests in Criminal Proceedings*, (1969).

candid statements, which directly manifest a conflict situation, as "conjecture and surmise" (Appendix, p. 12). In short, the opinion below is speculative and arbitrary in its failure to give The Sixth Amendment the credence and application which this Court requires.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of The Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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APPENDIX

NO. 13466

STATE EX REL.
ROBERT GORDON POSTELWAITE

v.

LEE BECHTOLD, SHERIFF, ETC., ET AL.

and

STATE EX REL. GARY LEE FRAZIER

v.

LEE BECHTOLD, SHERIFF, ETC., ET AL.

Wood County — Reversed

Haden, Chief Justice

1. Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.

2. To warrant post-conviction habeas corpus relief from a judgment of criminal conviction on the ground of ineffective assistance of counsel by reason of conflict of interest in joint representation of two or more defendants, the burden of establishing the conflict is upon its proponent.

3. The joint representation by counsel of two or more accused, jointly indicted and tried is not improper *per se;* and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative.

4. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics or arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." *Syllabus* point 21., *State* v. *Thomas*, W.Va. 203 S.E.2d 445 (1974).

5. When the findings of fact of a trial court in a post-conviction habeas corpus evidentiary hearing are against the plain preponderance of the evidence, are not supported by the evidence, are clearly wrong, or are the result of a mistaken view of the evidence, such findings will be set aside or reversed by this Court on review.

Haden, Chief Justice:

This is an appeal by custodial officers of the county and State from a final judgment of the Circuit Court of Wood County in a consolidated habeas corpus proceeding which declared the convictions of Robert Gordon Postelwaite and Gary Lee Frazier to be void and unenforceable on the ground that their jointly retained counsel had rendered ineffective assistance of counsel to each by reason of attempting to defend both against an identical criminal charge in the same trial.

Postelwaite and Frazier had been jointly indicted for the crime of receiving stolen property, a 1968 Ford Mustang automobile. At Postelwaite's expense, attorneys Eugene T. Hague, Senior and Junior, were retained to represent both on the charge. When indicted, Frazier was an employee of Postelwaite at Capri Motors in Parkersburg. On evidence mainly furnished by two admitted car thieves, both were convicted.

After sentencing, each with separate and new counsel petitioned this Court for a writ of habeas corpus, asserting ineffective assistance of counsel at trial as a ground for rendering their convictions void.

This Court awarded writs of habeas corpus which were subsequently made returnable to the Circuit Court of Wood County where the proceeding was heard and resolved by Special Judge William R. Pfalzgraf.

The sole issue presented in the trial court and here is whether the accused, who were jointly represented by counsel at trial in defense of identical criminal charges, received ineffective assistance of counsel through such joint representation. The resolution of this issue involves an analysis of counsel's ability to defend both clients, as demonstrated at trial, and counsel's trial strategy.

At the *habeas* hearing, extensive testimony was taken of the Hagues, James W. Simonton, the prosecutor who represented the State at the trial, and the relators. Additionally, the special judge considered the criminal trial transcript and relevant exhibits introduced there. This same evidence was presented to this Court for review.

Factually, the circumstances giving rise to the alleged conflict are relatively simple and largely uncontroverted; only the inferences and implications arising therefrom appear to be contested.

The potential hazards of joint representation apparently received very little attention in pretrial discussions between counsel and defendants. Frazier testified to the effect that he had very little pretrial communication with either of the Hagues, and indicated that he received most of his information regarding the preparation of the case through Pos-

telwaite. Postelwaite testified that during general conversation with the Hagues separate trials were considered, but stated that he relied upon counsel's judgment in this regard. Mr. Hague, Sr., an eminently qualified trial practitioner, did not favor separate trials for his clients and gave the following reason for not requesting a severance:

> "I didn't feel as a matter of defending the case it would be to the best interest of our clients. I felt they could be defended more readily in a joint effort, by having them together in the trial."

Mr. Hague, Sr., also testified that he didn't think severance was ever suggested because "they were innocent, so I didn't feel that was necessary." Mr. Hague, Jr. testified that in the pretrial discussions, it was decided that "We would represent them, that the trial would involve both." Judging from these statements, it is evident that counsel did not anticipate conflict of interest prior to trial. As the defendants were asserting complete innocence, potentially conflicting degrees of incrimination or culpability were not subjects of consideration or discussion.

Notwithstanding the pretrial assessment by the defense, the State, at trial, adduced testimony of two witnesses, Jack Bennett and Randall Hall, which seriously implicated both defendants in the offense charged, and also revealed other related conduct involving either or both of the defendants. Hall testified that he and one George DeBerry stole the Mustang, took it to a garage where he removed certain accessories and thereafter left it on the Montgomery Ward parking lot; that on the following day he went to Capri Motors where he told Frazier and Postelwaite about the car; that Postelwaite said they were going to get it; and that he, Hall, thereafter observed the Mustang at Capri

Motors. Hall testified that in a subsequent conversation with Postelwaite, he asked Postelwaite if they wanted to buy any other cars, but that Postelwaite said he "didn't need any then."

Hall and Bennett were also permitted to testify concerning other dealings with Postelwaite or Frazier, or both, in stolen property to show what the trial court referred to as "modus operandi". Hall testified that in February of 1971 he sold Postelwaite a 1967 Chevrolet for $175.00; that he and DeBerry sold Postelwaite a 1968 Camero in February or March of the same year; and that pursuant to a conversation with Postelwaite, in the presence of Frazier, Postelwaite allowed him, Hall, to take the engine and transmission from the '67 Chevy. Hall also related a similar transaction involving a 1969 or 1970 Volkswagen.

On cross-examination, Hall revealed that he, DeBerry and Bennett had stolen between ten and fifteen automobiles which, except for the ones that were retitled to and driven by them, they sold to Postelwaite and Frazier.

Bennett testified that he learned of the stolen Mustang during a conversation with Hall and DeBerry, and that he thereafter told the defendants about it. He also stated that "Gary and Bob said they was going to go get it." Bennett stated that he later saw the Mustang at Capri Motors when Frazier and Postelwaite also were present; that Frazier was under the hood "stripping" the car; that Postelwaite gave him $25.00 to get rid of the engine; and that Frazier put the engine on the back of his, Bennett's, truck.

Bennett testified concerning other dealings involving stolen automobiles. He stated that Frazier asked him to get a 1967 Camero, '67 Chevy SS or Malibou; that he thereafter

participated in the theft of a '67 Chevrolet which was taken to Capri Motors and sold to Frazier.

The effect of such testimony was assessed by Mr. Hague, Jr. in the habeas corpus proceeding:

> "At the trial, the State's witnesses brought evidence forth concerning involvements with one defendant on one case, another defendant on another, and sometimes ivolvement with both defendants, and we were limited in that we could not delve into the involvement of one of the defendants for the benefit of the remaining defendant."

Mr. Hague, Sr. made essentially the same observations with regard to cross-examination and, in addition thereto, described the effect thereof upon his summation to the jury:

> "It was the same situation so far as crossexamination was concerned. I thought we could not single out any particular phase of the testimony of either one of these gentlemen without causing some—I used the term injury—I mean unfavorable reaction of the jury to the testimony. By that I mean our defense was we were not guilty, I could not enlarge on Hall's testimony on crossexamination, because he was, as I said before, more than a voluntary witness. He was a witness who involved everybody and everything in all subjects, and I did not feel my examination of him on the argument before the jury should be singled out in any respect. We took the position all during the trial that the defendants were not guilty of any offense, and I so argued it before the jury."

Thereupon, Mr. Hague, Sr. was asked:

> "Weren't you, as stated in your affidavit, limited to a middle-of-the-road approach rather than shifting of the responsibility from one to the other?"

Mr. Hague replied:

"No doubt about that, yes, sir. That's correct."

Other effects of the joint representation were brought out in the habeas corpus proceeding but were, for the most part, similar retrospective observations based upon the same relative inability to effectively counter the State's witnesses.

On this evidence the circuit court found that a conflict of interest, which prejudiced both relators, evolved from the joint representation at trial. The determination involved has been recognized as, basically, as matter of fact. *Peterson* v. *Estelle*, 446 F.2d 53 (9th Cir. 1971). Such findings, made by a trial court in an evidentiary hearing in habeas corpus, will not be disturbed by this Court unless "manifestly erroneous" or "clearly wrong." *State ex rel. Pingley* v. *Coiner*, W.Va. , 186 S.E.2d 220 (1972); *State ex rel. Harrison* v. *Coiner*, 154 W.Va. 467, 176 S.E.2d 677 (1970).

Although we proceed in the perspective of the foregoing rule, this Court is somewhat limited in its ability to review the facts found because the lower court failed to adhere to the directives of *Code* 1931, 53-4A-7(c), as amended. That section of the Post Conviction Habeas Corpus Act requires that the final judgment order in such proceeding "shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided." Findings and conclusions were not stated in the trial court's final order, but the accompanying memorandum opinion substantially fulfilled the requirements of the statute, albeit in somewhat summary fashion:

"According to the testimony and affidavits of trial counsel, a principal witness for the state, testifying under a grant of immunity, testified as to transactions with each Petitioner as well as joint transactions involving both Petitioners. It further appears from trial counsel's testimony that at least at this point in the trial, it became in the best interest of each Petitioner to emphasize the culpable conduct of the other, a task which, of course, was rendered impossible by joint representation. As counsel testified he was compelled by joint representation to adopt a 'middle of the road' policy rather than to exploit the positive aspects of the witnesses testimony favoring one client to the detriment of the other.

"It is, in short, cleave (sic) from counsel's testimony, that the defense of each Petitioner was tempered by factors relating to the best interests of his co-defendant. This is precisely the hampering effect condemned in cases subsequent to Glasser. See, in particular Sawyer v. Brough, 358 F. 2d 70 (4th Cir. 1966)."

As noted, the court found that petitioners did have conflicting interests during their joint trial, obliquely concluding: "While the extent of prejudice resulting therefrom may have been minimal, I cannot find that there was no possibility of prejudice." The court, accordingly, "granted" the writ, which resulted in the discharge of the relators from custody.

In our view the trial court's conclusion of ineffective assistance of counsel, by reason of attempts to represent conflicting interests, was predicated upon defense counsel's failure to attack the damaging inculpatory testimony given by the two car thieves. Without question, the prosecution's adriot questions produced answers which implicated Postelwaite and Frazier separately and then together in the "re-

ceiving of stolen property" charge. The degree of culpability attributable to each defendant varied somewhat with the direction taken by the testimony of Hall and Bennett. Nevertheless, each defendant, if the State's witnesses were to be believed, could have been convicted separately rather than jointly, as they were.

Retrospectively, Mr. Hague, Sr. would have moved for a severance. With hindsight, both counsel might have vigorously cross-examined the State's witnesses to test their strength and consistency. When damaging testimony developed in trial, counsel felt "hampered" and obliged to pursue "a middle-of-the-road course," so as not to prejudice either client for the possible benefit of one.

All these considerations could have been of crucial significance if the defense stratey had been to place blame upon the other codefendant. That, however, was not the game plan adopted and pursued by these experienced trial counsel with the acquiescence of their clients. The following summarized evidence appears to have been ignored or, at least, not given the significance it deserves in the resolution of the charge of ineffective assistance of counsel.

Counsel prepared and executed the defense of this case based upon their clients' early and continuing claims of total innocence of the charge. Accordingly, although the record substantiates counsel's chosen course to pursue, of necessity, the middle-of-the-road defense during trial and summation, once both clients were directly impilcated in "receiving," it likewise reveals no effort to change or rectify the situation by motion for mistrial, severance or recusation. Rather, at the conclusion of the State's case, counsel moved for a directed verdict of acquittal, which was overruled. Thereupon, the defense announced that its witnesses would

be ready the following morning, and court was adjourned. On the following day, Postelwaite, Frazier, and two other defense witnesses testified. In the face of the State's testimony, Postelwaite denied ever having transacted any business with Jack Bennett or George DeBerry and, also denied that he ever purchased any cars from either of them. He, as well, denied any knowledge concerning the stolen Mustang. Frazier similarly denied any such transactions with Bennett or DeBerry, or Randy Hall and disclaimed any knowledge of the stolen Mustang. The other two defense witnesses, both of whom were employed at Capri Motors at the time of the alleged offense, testified that they were present at Capri Motors most of the evening when the crime was said to have occurred, and, that they had not observed Bennett or the Mustang on the premises. At the conclusion of all the evidence, counsel for defendants renewed the motion for a directed verdict of acquittal, which was denied. Instructions were tendered, approved and read to the jury. Interestingly enough, the only instructions differentiating between the two defendants were two proffered by the State.

If any general, overriding observation can be gleaned from the evidence, instructions and closing arguments in the criminal trial, it is that the veracity and credibility of the witnesses—whether prosecution or defense—was determinative of the outcome. The prosecution witnesses, if believed, clearly implicated; the defense witnesses, if believed, clearly exonerated. In view of this, it becomse apparant that the various shades of Postelwaite's as compared with Frazier's involvements in the criminal activity were relegated to positions of no significance by the overall defense strategy. While it is, indeed, conceivable that counsel could have isolated, refined and limited the respective inculpatory accusations of witnesses Hall and Bennett, an

achievement of such in one case would have been equally counter-productive in the other. On the other hand, it is neither apparent from the evidence, nor suggested by trial counsel that separate trials for the defendants would have resulted in a net benefit to either or both. We acknowledge that Mr. Hague Sr. stated in the *habeas* proceeding that had he represented only one of the defendants, he would have requested a severance. But, absent some relevant explanation for such observation, it is a patent *non sequitur* in view of the trial strategy pursued by defense counsel.

The courts have not been too receptive to retrospective appraisals of trial strategy. As an example, rather short shrift was given to this type of assertion in *Duran* v. *United States*, 413 F.2d 596 (9th Cir. 1969):

> "Appellants now criticize the defense 'adopted' from hindsight. If any defense was to be 'adopted,' it might well have been that 'the best defense' for the original four defendants 'to adopt' was to keep them all under the shepherd's crook of one attorney. Their attorney, David C. Marcus, Esq., is a well known and busy criminal defense attorney in Los Angeles, with at least twenty-five years' experience. By no means could his defense of these defendants have been described as a farce, or a sham. That he used an unsuccessful defense does not prove that it was not the best, nor that it was inadequate. '[B]ecause one counsel suggests after the fact, that he thinks the case should or could have been defended in a different manner, does not make the trial "a farce and a mockery of justice".' United States v. Callison, 408 F.2d 1362 (9th Cir., 1969)." *Id.*, at 599-600.

A total appraisal of the evidence in this case, we believe, clearly indicates a decisive and informed choice to unify the

defense against the prosecution also the defense lines of credibility and veracity, giving no quarter to admission, defection, or consortium. Under such circumstances, therefore, it is difficult if not impossible to perceive how, other than by conjecture or surmise, defense counsel, by the dual representation, slighted the defense of one defendant in favor of the other.

Conjecture and surmise will not suffice to brand counsel, appointed or retained, ineffective in the representation of one accused of crime. Conflict of interest precluding effective counsel must be established by the proponent. As was recognized in *United States* v. *Paz-Sierra,* 367 F.2d 930 (2d Cir. 1966):

> "Thus there is no reason to depart from our 'position' with respect to the requirement that conflict of interest must be shown as a foundation for any claim that joint representation was a deprivation of the right of counsel." *Id.*, at 933.

Accord, *United States* v. *Dardi,* 330 F.2d 316, 335 (2d Cir. 1964); *United States* v. *Bentvena,* 319 F.2d 916, 937 (2d Cir. 1963);

Gonzales v. *United States,* 314 F.2d 750 9th Cir. 1963).

The "conflict" to be established must be actual, and not merely speculative or theoretical. See *United States* v. *Lovano,* 420 F.2d 769 (2d Cir. 1970), where the rule was stated and applied:

> "The rule . . . is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the

effective assistance of counsel. (Citations omitted)" *Id.*, at 773.

> "Appellants have done no more than suggest a theoretical conflict of interest and have pointed to no specific prejudice to their cases." *Id.*, at 774.

Although joint defense of codefendants may result in the introduction of conflicting degrees of inculpatory evidence, that will not necessarily prove the proscribed "conflicting interests." Such was not dispositive in the defendant's favor in *People* v. *Gonzales*, 30 N.Y.2d 28, 330 N.Y.S.2d 54 (1972):

> "In no respect did the individual defenses of appellant and his codefendant run afoul of each other, nor did the efforts of counsel on behalf of Rodriguez interfere with appellant's defense." *Id.*, at 59 of 330 N.Y.S.2d.

Although factually distinguishable, the language of *United States* v. *Gallagher*, 437 F.2d 1191 (7th Cir. 1971), is also appropriate here:

> "The mere fact that the evidence against appellant's co-defendant . . . is stronger than that against the appellant does not indicate, must less demonstrate, the existence of a conflict of interest between the defendants. On the record before us, it indicates only that Thomas Gallagher apparently was the dominant member of the conspiracy and played a more prominent role in carrying out the illegal activities involved. That a difference in the weight of the evidence against co-defendants may cause trial counsel to speculate as to the trial strategy he should employ in the cross-examination of a witness, likewies, does not of itself serve to establish that counsel is unable to effectively represent both defendants . . . The existence of a conflict of interest, to warrant the

> result here sought, must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants." *Id.*, at 1194.

The foregoing authorities serve to illustrate that actual conflict must occur before a court is warranted in declaring a conviction void by reason of ineffective assistance of counsel. Those authorities do not minimize the law's or this Court's abhorrence of actual conflict arising from joint representation. Where such is evident the modern decisions are uniform in condemning joint representation which results in conflict; when found, prejudice is presumed. See *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Sawyer* v. *Brough*, 358 F.2d 70 (4th Cir. 1966); *Craig* v. *United States*, 217 F.2d 355 (6th Cir. 1954); *Holland* v. *Boles*, 225 F.Supp. 863 (N.D. W.Va. 1963); Annot., 34 A.L.R.3d 470 (1970). See also, 21 Am. Jur.2d *Criminal Law* § 319 (1965).

Fully recognizing the import of actual conflict of interests in representation of accused, this Court, nevertheless, continues to recognize the threshold premise dispositive in *State ex rl. Favors* v. *Tucker*, 143 W.Va. 130, 100 S.E.2d 411 (1957), cert.den. 357 U.S. 908, 78 S.Ct. 1153, 2 L.Ed. 2d 1158 (1958). There, we held:

> "The appointment by a trial court of the same attorney to represent two defendants indicted for the commission of the same crime is not in itself improper unless the facts and circumstances show that the interests of the two defendants are in conflict. . . ." Part *syllabus* point 2., *id.*

Thus, we return to a point of critical significance in a case charging ineffective assistance of counsel. Although ultimately unsuccessful, employment of the consistent de-

fense strategy, maintaining total innocence through "joint effort" and presentation at trial, cannot be ignored by this Court when such was pursued by experienced trial counsel. The option presented to the Court is whether defendants' conviction of the felony of receiving stolen property occurred despite considered trial strategy, tactics and arguable courses of action, voluntarily and understandingly consented to by the accused, or because of involuntary and uninformed acquiescences to joint representation resulting in conflict prejudicing one or both of the defendants. We conclude for the former.

The distinction between trial strategy gone awry and ineffective assistance of counsel was recently formulated and approved by this Court. That standard, one of which that may be employed to assess constitutionally required effectiveness of counsel, controls the holding of this appeal:

> "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics or arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." *Syllabus* point 21., *State* v. *Thomas*, W.Va. , 203 S.E.2d 445 (1974).

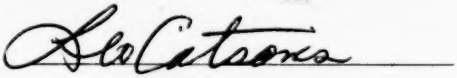
In the trial below, the circuit court failed to consider those facts which demonstrated the strategy of counsel whose performance was attacked. Its findings were plainly wrong and must be reversed. *Syllabus* point 3., *State ex rel. Pingley* v. *Coiner*, *supra*.

Accordingly, the decision of the Circuit Court of Wood County and the order discharging the appellees from constructive custody must be reversed, and the writ discharged.

Reversed.

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of Counsel for the Petitioners, and a member of the Bar of The Supreme Court of The United States, hereby certify that, on the 24th day of October, 1975, I served three copies of the foregoing Petition for a Writ of Certiorari on the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Richard G. Hardison, Assistant Attorney General for the State of West Virginia, State Capitol Building, Charleston, West Virginia 25305. I further certify that all parties required to be served have been served.



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